

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-01/09-24
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Office of Vermont Health Access (OVHA) denying her request for comprehensive orthodontia for her daughter under Dr. Dynasaur. The issue is whether her daughter's condition meets the criteria for prior authorization for orthodontia. The following decision is based upon the evidence admitted at hearing and telephone status conference. The record was closed on March 2, 2009 at the conclusion of the telephone status conference and the parties informed that a decision would be forthcoming.

Motion to Continue and/or Reopen

On March 31, 2009, OVHA filed a Motion to Continue and/or Reopen the recommended decision being considered by the Human Services Board on April 1, 2009. The recommended decision under consideration was sent to the parties on March

17, 2009. OVHA brought its motion pursuant to Fair Hearing Rule 1000.4K (motion to reopen after Board issuance of Order); however, the proper rule for consideration is Fair Hearing Rule No. 1000.4B (oral argument before Board).

Fair Hearing Rule No. 1000.4B states, in part:

At its meeting the Board shall hear oral arguments in the case upon the request of either party...Objections to facts found, or not found, by the hearing officer shall be made to the Board by written or oral motion. To the extent practicable, such objections shall be submitted to the hearing officer at least 7 days prior to the day of the scheduled Board meeting. A motion to present additional evidence must identify good cause why the evidence was not presented during the initial fair hearing.

OVHA's Motion did not identify specific objections nor was the Motion filed within the time limits contemplated in the above rule. It should be noted that if the petitioner had filed a Motion the day before a Board meeting requesting additional time to present evidence, OVHA would have strenuously objected to Board consideration of the Motion.

OVHA's Motion did not contain a proffer of evidence. OVHA had not indicated at the March 2, 2009 telephone status conference that they had additional evidence to present to the hearing officer. At the Board meeting, OVHA was asked to make a proffer or identify evidence that was not already part

of the record before the hearing officer as part of the Dental and Medical Basis statements accepted into evidence. OVHA was unable to do so.

The Motion to Continue and/or Reopen is denied.

FINDINGS OF FACT

1. The petitioner is the mother of A.G. Her daughter is thirteen years old and a fraternal twin.

2. On or about October 17, 2008, Dr. T.F., A.G.'s orthodontist, submitted a Prior Authorization Form for comprehensive orthodontia to OVHA. Dr. T.F. supplied OVHA with models and x-rays. Dr. T.F. did not check any of the criteria for orthodontic treatment.

3. OVHA, on its review of the materials, found that A.G. met one minor criterion, traumatic deep bite impinging on palate. OVHA sent petitioner a Notice of Decision denying coverage on October 23, 2008. OVHA stated that A.G. did not meet the state criteria for orthodontia and did not meet the medical necessity standard under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) program.

4. Petitioner submitted a letter from D.S., Psy.D. (clinical school psychologist) dated October 27, 2008. D.S.

did a psychological evaluation of A.G. on September 23, 2008. He wrote that A.G. was depressed and had poor self-esteem that was partly attributable to the condition of her teeth. He stated that braces would play a significant role in improving A.G.'s self-esteem.

5. The petitioner utilized OVHA's internal grievance procedure by appealing OVHA's decision on November 4, 2008. An internal review was held on December 2, 2008. At that review, petitioner explained that her daughter was picked on because of her teeth. Petitioner submitted a letter dated December 2, 2008 from D.C., a school based clinician.

D.C. wrote that she saw A.G. two to three times per week to deal with A.G.'s depression and to help A.G. develop skills to tolerate the harassing she received from her peers about her teeth. D.C. wrote that braces are "a critical matter of mental health" for A.G.

OVHA requested additional psychological information to document that A.G. will suffer psychological harm if OVHA denied the request for orthodontia.

6. Dr. T.K., A.G.'s pediatrician, wrote a short letter dated December 12, 2008 that A.G. was in counseling for depression and poor self-esteem. OVHA did not change their

decision. On December 18, 2008, OVHA notified petitioner that her request for orthodontia was denied. Petitioner filed an appeal to the Human Services Board on January 14, 2009.

7. A fair hearing was held on February 10, 2009. Petitioner submitted additional documentary evidence from Dr. T.K. and Dr. T.F.

Dr. T.K. wrote to Dr. T.F. on February 5, 2009 that A.G. was called "gappy" and was self-conscious about her teeth; A.G.'s problems with her teeth contributed to her low self-esteem. Dr. T.K. wrote that she saw A.G. on January 8, 2009 for an evaluation of depression. She found that A.G. was not clinically depressed. Dr. T.K. wrote that A.G.'s poor self-esteem could be helped by orthodontia.

Dr. T.F. wrote to Dr. T.K. on January 31, 2009 for further information. Based on that information, he added to the Prior Authorization form that there were medical considerations due to depression and low self-esteem.

OVHA was given an opportunity after the hearing to review their decision based on the new information.

8. The petitioner testified. She explained that A.G. is a fraternal twin. A.G.'s twin is successful at school,

has straight teeth, and is attractive. A.G. compares herself to her twin. In addition, her schoolmates compare A.G. to her twin to A.G.'s detriment. Petitioner explained that A.G.'s teeth have a lot to do with her poor self-esteem.

A.G. has been called "gappy" by her schoolmates since elementary school. A.G. does not smile, is not active at school, and tends to isolate herself. A.G. may self-isolate for days.

The petitioner described a severe gap between A.G.'s two front upper teeth. She said the teeth may be one centimeter apart. Petitioner described the teeth as inverted and not straight. She said A.G. had "bucky" teeth. Petitioner said x-rays show that A.G. is missing an adult tooth under a baby tooth in the rear of her mouth. Once A.G.'s baby tooth comes out, A.G. will not have a surface for the corresponding tooth to hit causing other problems.

9. D.C. testified at hearing. D.C. is a school based clinician employed by a local mental health agency. D.C. has a bachelor's degree and has been a counselor for fifteen years. She is supervised by a master's level clinician who she believes to be licensed. Her services are funded through the Department of Mental Health. D.C. diagnosed A.G. with

developing identity ability and dysthymia (mood disorder characterized by depression). D.C.'s diagnosis was confirmed by her supervisor.

As a school based clinician, D.C. works with children having difficulties in and/or out of school.

D.C. has worked with A.G. for two years. A.G. was referred by her teachers. A.G. was having difficulties because her parents were divorcing. Although A.G. did well in the school in the past, she was having problems with grades. A.G. was having difficulty with relationships, depression, and would not attend outside counseling.

D.C. sees A.G. two to three times per week. She does not do counseling but assists A.G. with strategies to deal with her problems. A.G. has repeatedly brought up being called "gappy" and "bucky" by her peers. D.C. works with A.G. on responses.

D.C. described A.G.'s affect as guarded and defensive. A.G. is very self-conscious due to her teeth and tends to withdraw. D.C. stated that A.G. acts out towards the peers who ridicule her.

D.C. said that improving A.G.'s teeth would improve her self-esteem. If A.G.'s teeth are corrected, A.G. would be less of a target to others.

10. A telephone status conference occurred on March 2, 2009. OVHA did not change their decision after reviewing the material from the hearing. Petitioner was given the opportunity to submit additional information but stated that was not necessary.

ORDER

OVHA's decision is reversed.

REASONS

States are required to provide dental services to Medicaid recipients under the age of twenty-one if certain criteria are met as part of the EPSDT requirements. Dental services are defined at 42 U.S.C. § 1396d(r)(3) to include services:

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

To meet EPSDT requirements, Vermont has adopted regulations found at M622 that state, in part:

M622.1 Definition

Medically necessary orthodontic treatment involves the use of one or more prosthetic devices to correct a severe malocclusion.

M622.4 Conditions for Coverage

To be considered medically necessary, the beneficiary's condition must have one major or two minor malocclusions

according to diagnostic criteria adopted by the department's dental consultant or if otherwise necessary under EPSDT found at M100. (emphasis added)

The treating orthodontist or dentist completes a Prior Authorization Request Form that addresses the state's criteria. This form first asks for the following diagnostic information:

Major Criteria

Cleft palate
2 impacted cuspids

Severe Cranio-Facial Anomaly

Minor Criteria

1 impacted cuspid
2 blocked cuspids per arch
(deficient by at least 1/3
of needed space)
3 congenitally missing
teeth per arch (excluding
third molars)
Open bite 4+teeth, per
arch
Crowding per arch (10+mm)
Anterior crossbite
(3+teeth)
Posterior crossbite
(3+teeth)
Traumatic deep bite
impinging on palate
Overjet 8+mm (measured
from labial to labial)

Eligibility for comprehensive orthodontic treatment requires that the malocclusion be severe enough to meet a minimum of **1** major or **2** minor diagnostic criteria.

In petitioner's case, her daughter does not meet the criteria of either one major or two minor criteria. OVHA only found one minor criteria.

The inquiry does not stop with these criteria. The form also asks whether there are special medical considerations. Looking at special medical considerations falls under the EPSDT requirements.

Vermont is required to provide EPSDT services to children. M100 incorporates federal requirements by stating:

The scope of coverage for children under the Early Periodic Screening, Diagnosis and Treatment (EPSDT) provisions of Title XIX is different and more extensive than coverage for adults...Specifically, Vermont is required to provide

...such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of [1396d] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered by the State [Medicaid] plan. 42 U.S.C. § 1396d(r)(5).

A further definition of the scope of EPSDT services is found in 42 C.F.R. § 1396d(a)(13) which requires states to provide

Other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services...for the maximum reduction of physical or mental disability and restoration of an individual to the best functional level.

Also, orthodontia is medically necessary when there is "a determination that a service is needed to achieve proper growth and development or prevent the worsening of a health condition". M107.

The issue is whether the petitioner has presented sufficient evidence to show that orthodontia is medically necessary.

Although A.G.'s depression is multi-factorial, the record illustrates that A.G.'s "gappy" teeth are a major factor impacting her self-esteem and depression. This is documented in the materials from A.G.'s pediatrician (Dr. T.K.), her orthodontist (Dr. T.F.), D.S. (clinical school psychologist), and D.C. (school based counselor). Both D.C. and petitioner testified at hearing that A.G. is negatively impacted by her the appearance of her teeth; namely, repeated teasing or harassing by her peers, difficulty with relationships, lower grades, self-isolating behavior, and, at times, acting out towards her peers. Their opinion is that orthodontia will improve A.G.'s self-esteem and corresponding sadness. In other words, orthodontia will help A.G. "achieve proper growth and development".

The Department objected at hearing to D.C.'s testimony claiming that she is not an expert because she is not licensed. D.C. testified both to her first hand impressions based on two years of working regularly with A.G. and to her opinion as to diagnosis and the impacts of orthodontia. The Department's objection was overruled at hearing.

One need not be licensed to be considered an expert under the Vermont Rules of Evidence (VRE). The pertinent portion of VRE 702 identifies expert witnesses as qualified by "knowledge, skill, experience, training, or education". See State v. Bubar, 146 Vt. 398 (1985) (rape counselor qualified as expert based on trainings, familiarity with literature, and assistance to four victims); In Re D.C., 163 Vt. 517 (1995) (SRS employees qualified as experts based on years of experience); State v. Weatherbee, 156 Vt. 425 (1991) (look at a person's education or training to determine if qualified as an expert). D.C. had the requisite education, experience, and training to provide expert testimony in this proceeding.

The test under EPSDT is not only to prevent the worsening of a condition. The test includes whether the treatment will restore the individual to the highest functioning. In Rosie D. v. Romney, 410 F. Supp.2d 18 (D.Mass. 2006), the Court stated on page 26:

Courts construing EPSDT requirements have ruled that so long as a competent medical provider finds specific care to be "medically necessary" to improve or ameliorate a child's condition, the 1989 amendments to the Medicaid statute require a participating state to cover it.

Dr. T.K. resubmitted a prior authorization form stating that orthodontia is medically necessary based upon other

medical considerations. The evidence submitted by petitioner supports this opinion. Accordingly, OVHA's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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